INDEX

	PAGE
Petition	1
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Statute Involved	4
Statement	4
Reasons for Granting the Writ	9
Conclusion	12
Appendix "A" (Provisions of Hepburn Act, as amended, regulating issuance of free passes, 34 Stat. 584, 49 U. S. C., Sec. 1 (7)	14

TABLE OF CASES CITED

Bowman v. Pennsylvania Railroad Company, 299 Pa. 558, 566 (1930)	10
Cope v. Davison, 30 Cal. 2d 193	11
Evens v. Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, 134 F. (2d) 275 (C. C. A. 5th) cert. denied 319 U. S. 756	12
Francis v. Southern Pacific Co., 333 U. S. 445	2, 9

PAGE

Kansas City Southern Ry. Co. v. VanZant, 260 U. S. 459 2, 9
Kasanovich, Adm'x v. George, 348 Pa. 199, 202 (1943) 10

New York Central Railroad Co. v. Mohney, 252 U. S. 152 ..... 2, 11
Nickerson's Case, 218 Mass. 158 11
Northern Pacific Co. v. Adams, 192 U. S. 440 ..... 9, 13

Pennsylvania Railroad Co. v. Goldie, 182 F. (2d) 9, (C. C. A. 6th) 13
Philadelphia & Reading Co. v. Derby, 14 Howard 468 .. 9

Steamboat New World v. King, 16 Howard 469 9

Turek Adm'x v. Pennsylvania Railroad Company, 361 Pa. 512 5

Universal Concrete Pipe Co. v. Bassett, 130 Ohio St. 568 11

MISCELLANEOUS CITATIONS

Elliott, Railroads (3d ed.), Sec. 2253 9

Hepburn Act, as amended, 34 Stat. 584, 49 U. S. C., sec. 1 (7) 2, 4, 9, 14

U. S. C. Section 1257 (3) 2

IN THE

Supreme Court of the United States

Term, 1952. No.

ANTOINETTE TUREK,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Antoinette Turek, prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of Pennsylvania, reversing a judgment in her favor in the sum of $15,000 entered in the trial court, Court of Common Pleas No. 6 of Philadelphia County, State of Pennsylvania, and directing that judgment be entered in favor of the respondent, Pennsylvania Railroad Company; said final judgment of the Supreme Court of Pennsylvania was entered January 7, 1952 and a Petition for Reargument was presented and refused as is hereinafter set forth.

OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania is reported in Volume 369 Pennsylvania State Reports (Pa.) at page 341. The dissenting opinion is at page 346.

The opinion of the trial court, the Court of Common Pleas No. 6 of Philadelphia County, State of Pennsylvania, is not reported. The opinion is set forth in the Record, pp. 126a to 133a.

JURISDICTION.

The final judgment of the Supreme Court of Pennsylvania, the highest court of the Commonwealth of Pennsylvania, was entered on January 7, 1952. Pursuant to the rules of said court, a timely Petition for Reargument was filed on January 10, 1952 and was refused on February 4, 1952. The jurisdiction of this court is invoked under 28 U. S. C. Section 1257 (3).

The federal question sought to be reviewed is the right of the petitioner, as the user of a free pass in an interstate trip, issued to her by the respondent, Pennsylvania Railroad Company, pursuant to the provisions of the Hepburn Act, to recover for personal injuries. The federal law is controlling to the exclusion of state law—*Kansas City Southern Ry. Co. v. VanZant*, 260 U. S. 459; and the petitioner is entitled to recover if the employees of the carrier were guilty of wilful *or* wanton negligence—*Francis v. Southern Pacific Co.*, 333 U. S. 445; *New York Central Railroad Co. v. Mohney*, 252 U. S. 152.

The respondent, Pennsylvania Railroad Company, in paragraph 1 of New Matter (R. 7a) set forth that the plaintiff was traveling interstate on a gratuitous pass duly issued, upon the application of her husband, Frank S. Turek, deceased, pursuant to an Act of Congress to wit, The Hepburn Act, as amended, 49 U. S. C., sec. 1 (7).

The trial judge charged the jury, pursuant to the applicable federal law, that the burden of proof was on the plaintiff to establish that the defendant acting through its employees was guilty of wanton negligence (R. 111a).

The Supreme Court of Pennsylvania recognized that the federal law governs and the opinion of the Court states:

"Turek's widow, admittedly was an interstate passenger, riding on a gratuitous pass containing a release of liability, when she received her personal injuries and she cannot recover without a showing of wilful or wanton misconduct on defendant's part: Francis v. Southern Pacific Co., 333 U. S. 445" (R. 139).

But the foregoing statement of the Supreme Court of Pennsylvania is erroneous in that the court substitutes the term "wilful or wanton misconduct" for the term "wilful or wanton negligence."

In the Petition for Reargument (R. 144) it was alleged that the Supreme Court of Pennsylvania erred in applying the standard of wanton misconduct as it has evolved in the Pennsylvania cases, in that "wanton misconduct" so construed is actually equivalent to wilful negligence. Hence wanton negligence is virtually eliminated as a basis for recovery, contrary to the federal law and the federal public policy which is controlling.

The petition for reargument was refused.

QUESTIONS PRESENTED.

1. May the federal rule, which permits a carrier to be relieved of liability for injuries sustained by the lawful user of a free pass, where such injuries are caused by ordinary negligence, be extended to relieve the carrier of liability for gross negligence.

2. May a state court in applying the federal law, in an action for personal injuries sustained by the lawful user of a free pass in an interstate trip, substitute the term "wanton

misconduct" for the term "wanton negligence" and then construe wanton misconduct as equivalent to wilful or intentional injury.

3. Where a jury has returned a verdict based on wanton negligence, in a case governed by federal law, may a state appellate court set aside the verdict by holding that the act of the engineer of a passenger train in operating the train around a dangerous curve at a tortiously excessive rate of speed might be gross negligence but did not amount to "wanton misconduct" as that term is construed under the state law, because it was not established that the engineer had actual knowledge that the accident was imminent.

STATUTE INVOLVED.

The statute involved is the Hepburn Act, as amended, 34 Stat. 584, 49 U. S. C. sec. 1 (7).

The pertinent provisions are printed in Appendix "A."

STATEMENT.

The petitioner's husband, Frank S. Turek, was an employee of the respondent, Pennsylvania Railroad Company. He obtained a special round-trip pass between Altoona, Pennsylvania and Detroit, Michigan. The petitioner and her two small children, on the return trip, boarded a passenger train known as "The Red Arrow" at Detroit, Michi-

gan, on February 18, 1947. Her husband, who had not accompanied her to Detroit, met the train at Pittsburgh, Pennsylvania, and joined his family for the trip to Altoona, where they resided. On the Bennington curve, a sharp and dangerous curve in the mountains of Pennsylvania, about eight miles west of Altoona, "The Red Arrow" jumped the tracks against a 3½ inch superelevated rail, crossed over two sets of westbound tracks, overturned to the outside of the curve and plunged down a steep embankment. The petitioner's husband was killed and she sustained serious personal injuries.

In a prior action to recover for the wrongful death of the husband, it was held that since he was on an *intrastate* trip, the law of Pennsylvania was applicable, and that notwithstanding the release in the pass, the plaintiff could recover upon a showing of ordinary negligence. Judgment on a verdict for plaintiff was affirmed by the Supreme Court of Pennsylvania—*Turek Adm'x v. Pennsylvania Railroad Company*, 361 Pa. 512.

This case is an action to recover for the personal injuries sustained by the wife, and since her trip was an *interstate* trip, it is conceded that the federal law governs.

The evidence offered by the petitioner established that Bennington curve curves sharply to the right (R. 10a), the degree of curvature being 8° 30′ (R. 20a). At this point there are four tracks. From the south or inside of the curve track No. 1 is designated as eastward freight; track No. 2 as eastward passenger; track No. 3 as westward freight and track No. 4 as westward passenger (R. 10a). The defendant railroad had imposed a 35 miles an hour speed limit on the approach to the curve and a 30 miles an hour speed limit on the curve itself (R. 12a).

The outside rail of track No. 2 on which "The Red Arrow" was travelling eastward is elevated at the curve 3½ inches above the inside rail to assist trains in making the curve with safety (R. 11a). "The Red Arrow" travelled a

short distance on the curve and then jumped the high rail, crossed over the two westbound tracks, No. 3 and No. 4, overturned and plunged down the embankment to the north or outside of the curve (R. 12a).

From a chart prepared by the railroad company in the course of its investigation, it was shown that the first engine overturned to the left and came to rest down the embankment 405 feet east of the point of derailment (R. 15a). The tender of the first engine came to rest down the embankment, upside down, 432 feet east of the point of derailment. The second engine overturned to the left and came to rest on its left side down the embankment at a point 401 feet east of the point of derailment. The tender of the second engine stopped, upside down, down the embankment, 469 feet east of the point of derailment. The first car stopped on its left side down the embankment 425 feet east of the point of derailment. The second car stopped on its left side across tracks No. 3 and No. 4 at a point 481 feet east of the point of derailment. The third car, the car in which the plaintiff was a passenger, turned completely over and stopped with the front end on top of the first car and the rear end on track No. 4. The fourth car stopped on its left side and *on top* of the tender of the first engine. The remaining cars were carried forward and to the left for a considerable distance with the fifth and sixth cars also plunging down the embankment (R. 16a, 17a, 18a).

The petitioner testified that she had passed over the curve some 18 or 20 times prior to this occasion; that as the train came out of a tunnel about one mile west of the curve it picked up speed instead of slowing down and that the farther it went the faster it went so that cars swayed from side to side, baggage fell from overhead racks and passengers were jostled one against the other. The car she was riding in turned completely over and she was pinned under the seat which came down and crashed against the ceiling (R. 23a, 24a, 25a).

The engineer who operated the first engine, the sole survivor of the two crews (the other engineer and both firemen were killed), testified that he had operated trains over Bennington curve for many years, that he knew the curve was there and that there was a thirty mile speed limit (R. 29a, 30a).

It was established that over an 8° curve having 3 inches of superelevation of outside rail, the overturning speed is 64 miles per hour (R. 103a). There is a speed recording device on the curve but the train only travelled about one-tenth of the distance of the curve which was not enough to permit the speed recorder to operate (R. 54a, 55a).

For the respondent, the engineer testified that he complied with all the rules and that he operated the train within the authorized speed limit. He testified that he heard a bump which might have been a broken spring hanger (R. 33a-36a). On cross-examination he admitted that the train was derailed before he felt the bump (R. 40a). The respondent also introduced records kept pursuant to the block signal system of operation. There was an unexplained disparity between the train dispatcher's records kept at Pittsburgh and the records kept by the block operator (R. 61a, 62a). Speaking of the records, the trial judge in his opinion said:

> "The time records relied upon by the defendant as corroborating the engineer's testimony were at best inconclusive, for they disclosed an admitted and unexplained discrepancy and also an apparent, although denied, alteration" (R. 131a).

The opinion of the Supreme Court of Pennsylvania makes no reference to the records.

An official of the respondent railroad company, J. D. Morris, superintendent of the Pittsburgh division, testified that in his opinion the distance travelled by the engines and cars after the derailment, was consistent with a speed of twenty-two miles an hour (R. 97a). This opinion was

only concerned with the distance travelled. The witness admitted that he had never taken part in an investigation involving so sharp a curve (R. 95a). His opinion ignored the superelevation of the outside rail, the *dispersal* of the engines and cars after the derailment and their overturning.

In spite of the fact that the railroad had the sole and exclusive opportunity to investigate the accident, and did in fact conduct a thorough and exhaustive investigation as was shown by the chart which was offered in evidence (R. 18a), the *respondent offered no affirmative evidence to explain the happening of the accident.*

There was a verdict for the petitioner in the sum of $15,000. The respondent filed a motion for judgment n. o. v. which was refused by the trial court and judgment was entered for the petitioner.

The respondent appealed to the Supreme Court of Pennsylvania which reversed the judgment and ordered final judgment to be entered in favor of the respondent. The opinion of the court states:

> "This evidence, in the absence of an explanation by defendant, would be ample upon which to base a finding of excessive speed amounting to lack of due care (Turek Adm'x v. Pennsylvania R. R. Co., 361 Pa. 512, 64 A. 2d 779)—it might even be sufficient to show gross negligence. However, we are convinced that such testimony is wholly inadequate to warrant a finding of speed so excessive as to amount to wilful or wanton misconduct, i. e. to show that defendant's engineer had *actual knowledge* (emphasis supplied) of plaintiff's peril but nevertheless pursued his tortious speed with utter indifference to the outcome" (R. 140, 141).

Mr. Justice Horace Stern filed a dissenting opinion (R. 142-144, inc.).

REASONS FOR GRANTING THE WRIT.

1. The decision of the Supreme Court of Pennsylvania is repugnant to and conflicts with the federal law which governs this case.

The Hepburn Act, enacted in 1906, prohibits the issuance of free passes in interstate transportation except to certain specified classes of persons. The Supreme Court of the United States in *Kansas City Southern Ry. v. VanZant*, 260 U. S. 459, 468 held that Congress took over the entire field of free passes to the exclusion of state law and, in effect, enacted the federal rule as expressed in *Northern Pacific Co. v. Adams*, 192 U. S. 440, that a release of liability provided for in a free pass is effective to relieve the carrier of liability for *ordinary negligence*.

This rule was re-affirmed in *Francis v. Southern Pacific Co.*, 333 U. S. 445. It was held that the well-settled rule sustaining waivers of liability for ordinary negligence has become part of the warp and woof of the Hepburn Act.

But the passenger does not lose all his rights by the waiver of liability in the pass. The Court in *Northern Pacific Co. v. Adams*, 192 U. S. 440, stressed the limitation of this rule to ordinary negligence. The opinion at page 452, cites *Philadelphia & Reading Co. v. Derby*, 14 Howard 468, and *Steamboat New World v. King*, 16 Howard 469, as cases where passengers were permitted to recover even though they received free transportation, because the carriers' employees were guilty of gross negligence. It is true that neither of these cases involved a waiver of liability contained in the provisions of a free pass. But it is an almost universal rule, even in jurisdictions which permit a release of liability for ordinary negligence, that a carrier cannot limit its liability by contract for injuries caused by gross negligence—Elliott, *Railroads* (3d ed.), Sec. 2253.

The Supreme Court of Pennsylvania in an earlier case had recognized the true federal rule. The case of *Bowman v. Pennsylvania Railroad Company*, 299 Pa. 558, 566 (1930), involved a passenger who was injured while riding on a free pass in an interstate trip. The Court said:

> "The burden of proof was here on the plaintiff to show at least that the employees of defendant were guilty of wilful, wanton or *gross negligence*." (Emphasis supplied.)

In the case of *Kasanovich, Adm'x v. George*, 348 Pa. 199, 202 (1943), it was decided for the first time in Pennsylvania that contributory negligence is not a defense where the defendant is guilty of *wilful or wanton misconduct*. Because Pennsylvania does not recognize the doctrine of comparative negligence or the "last clear chance" doctrine, the Court in its opinion established an affinity between wanton misconduct and a wilful tort, since in the case of wilful or intentional injury, contributory negligence is not a defense.

The Supreme Court of Pennsylvania reached the conclusion that it did in the instant case by ignoring the federal rule which is properly applicable, and by applying and extending the rule expressed in the *Kasanovich* case.

As the Supreme Court of Pennsylvania construes wanton misconduct in the instant case it cannot be distinguished from a wilful or intentional tort. One who has actual knowledge that his actions will result in harm but proceeds nevertheless, must be held in law to have intended the harm which does result.

It is significant that Mr. Justice Horace Stern, who wrote the opinion in the *Kasanovich* case, wrote a dissenting opinion in this case.

2. The decision of the Supreme Court of Pennsylvania conflicts with the decision of the Supreme Court of the

United States in *New York Central Railroad Co. v. Mohney*, 252 U. S. 152.

A comparison of the facts in the *Mohney* case with the facts in the case at bar shows that there is no valid distinction between the two cases. In the *Mohney* case the engineer disregarded two block signals indicating danger ahead and collided with the rear of another train. In the instant case, the engineer with full knowledge of the existence of the dangerous curve, disregarded the warning represented by the speed limit and overturned his train.

Whereas, in the *Mohney* case the Supreme Court of the United States held that the evidence justified a finding of wanton negligence, the Supreme Court of Pennsylvania in the instant case reached the opposite conclusion.

3. Unless the decision of the Supreme Court of Pennsylvania is reviewed and the rights of users of free passes, issued to employees and their families, is guarded, such rights may be seriously jeopardized in a number of other states and some federal courts which have replaced the concept of "wanton negligence" with "wanton misconduct", construed as equivalent to wilful negligence.

This case transcends in importance the rights of the petitioner or the error of the Supreme Court of Pennsylvania. The term "wanton misconduct" was unknown in the common law. It was introduced in statutes, such as provisions in workmen's compensation statutes providing that the employe is not eligible for benefits if he is guilty of wanton misconduct (*Nickerson's Case*, 218 Mass. 158); or the so-called "guest statutes," which sometimes provide that a guest in an automobile cannot recover from the host unless the latter is guilty of wanton misconduct (*Cope v. Davison*, 30 Cal. 2d 193); and in judicial decisions which hold that contributory negligence is not a defense where the defendant is guilty of wanton misconduct (*Universal Concrete Pipe Co. v. Bassett*, 130 Ohio St. 567, where the difference

between wanton negligence and wanton misconduct is discussed in rather interesting fashion).

The danger presented to the rights of a user of a free pass under the federal law by substitution of the term wanton misconduct for wanton negligence is made clearly evident by the case of *Evens v. Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans*, 134 F. (2d) 275 (C. C. A. 5th), cert. denied 319 U. S. 756. In that case the plaintiff was a user of a free pass in an interstate trip who brought an action against the carrier to recover for personal injuries. A judgment entered on a verdict in her favor based on wanton negligence was affirmed by the majority of the Circuit Court of Appeals. But there was a dissenting opinion which held that the judgment should be reversed because the evidence did not measure up to wanton misconduct, of which it was said:

> "Wanton misconduct is such as puts the actor in the class with the wilful doer of wrong." (Page 277.)

Given this construction of wanton misconduct in pass cases, the federal rule would permit a carrier to be relieved of liability for death or personal injuries sustained by a lawful user of a free pass, unless inflicted wilfully or intentionally.

This harsh and inhuman construction, accepted by the majority opinion in the instant case and the dissenting opinion in the *Evens* case may supplant the true federal rule in any future case involving the rights of a user of a free pass. Thus there is real necessity for a definitive decision by the Supreme Court of the United States, if the rights of lawful users of free passes are not to remain susceptible of being construed virtually out of existence.

4. It is particularly important to guard the rights of passengers who are lawful users of free passes, since the issuance of such passes is strictly governed by Act of Congress

and is confined to persons naturally entitled to the use of such passes.

At the time the federal rule was established in the case of *Northern Pacific Co. v. Adams*, 192 U. S. 440, the issuance of free passes by interstate railroads was frequently abused, which was undoubtedly the reason for the federal rule that persons who accepted such passes should be bound by the waiver of liability, at least as far as ordinary negligence is concerned.

But with the strict regulation of free passes which prevails at the present time, it is clearly in the public interest to confine the limitation of liability to its proper limits and not to extend it by a process of erosion which narrows the passenger's rights to the vanishing point.

6. The injustice to the petitioner by the decision of the Supreme Court of Pennsylvania, which has deprived her of a verdict justly compensating her for serious personal injuries, is aggravated by the fact that in the case of *Pennsylvania Railroad Co. v. Goldie*, 182 F. (2d) 9, (C. C. A. 6th), a plaintiff who was also riding on an employee's pass containing a waiver of liability and who was also a passenger on the Red Arrow and who was also injured in the same accident, was permitted to recover. Speaking of the *Goldie* case, Mr. Justice Horace Stern, in his dissenting opinion said:

> "I can find no basis for distinguishing it either as to the evidence there presented or the applicable law."

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH MATUSOW,
Counsel for Petitioner.

APPENDIX "A".

Provisions of Hepburn Act, as amended, regulating issuance of free passes, 34 Stat. 584, 49 U. S. C., Sec. 1 (7).

Free transportation for passengers prohibited; exceptions; penalty. No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live-stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of

providing relief in cases of general epidemic, pestilence, or other calamitous visitation; *And provided further,* That this provision shall not be construed to prohibit the privilege of passes, or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this chapter; *Provided further,* That the term "employees" as used in this paragraph shall include furloughed, pensioned, and super-annuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and exemployees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction shall pay to the United States a penalty of not less than $100 nor more than $2000, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in sections 41, 42, and 43 of chapter 2 of this title.

INDEX TO BRIEF FOR RESPONDENT.

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	1
Statute Involved	1
Statement	2
Argument	6
I. The Decision Below Depends Entirely Upon an Evaluation of the Evidence	6
II. The Pennsylvania Supreme Court Applied the Federal Rule in Determining the Sufficiency of the Evidence	7
III. The Pennsylvania Supreme Court Was Correct in Holding That the Petitioner Failed to Prove Wilful or Wanton Negligence	11
Conclusion	13

TABLE OF CASES CITED.

	Page
Bowman v. Pennsylvania Railroad Co., 299 Pa. 558, 149 Atl. 877 (1930)	8
Delaware and H. R. Corp. v. Bonzik, 105 F. 2d 341 (3d Cir. 1939)	11
Emmick v. Baltimore & Ohio Railroad Co., cert. den. 340 U. S. 831 (1950)	7
Evens v. Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans, 134 F. 2d 275 (5th Cir. 1943), cert. den. 319 U. S. 756 (1943)	7, 8, 9, 10
Francis v. Southern Pacific Co., 333 U. S. 445 (1948)	6, 8
Gentry v. Seaboard Air Line Railroad Co., cert. den. 340 U. S. 853 (1950)	7
Healy v. Pennsylvania Railroad Co., cert. den. 340 U. S. 935 (1951)	7
Kasanovich, Admrx. v. George, 348 Pa. 199, 34 A. 2d 523 (1943)	6, 8
Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387 (1923)	7
New York Central Railroad Co. v. Mohney, 252 U. S. 152 (1920)	7, 12
Pennsylvania Railroad Co. v. Goldie, 182 F. 2d 9 (6th Cir. 1950)	12
Roberts v. Alabama Great Southern Railroad Co., cert. den. 340 U. S. 829 (1950)	7
Roberts v. Missouri-Kansas-Texas Railroad Co., cert. den. 340 U. S. 832 (1950)	7
Swain v. American Mutual Liability Ins. Co., 134 F. 2d 886 (5th Cir. 1943)	8, 10
Westre v. Chicago M. & St. P. Ry. Co., 2 F. 2d 227 (8th Cir. 1924)	9
Wilkerson v. McCarthy, 336 U. S. 53 (1949)	7

STATUTES AND AUTHORITIES CITED.

	Page
Act of June 25, 1948, Chapter 646, 62 Stat. 929 (28 U. S. C. Section 1257)	1
Hepburn Act, as amended, 34 Stat. 584, 49 U. S. C. Section 1(7)	1
Prosser on Torts (1941 ed.) pp. 260-262	7
Restatement of Torts, Section 500	7, 8, 10

IN THE

Supreme Court of the United States.

No. 634.

October Term, 1951.

ANTOINETTE TUREK,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Supreme Court of Pennsylvania (R. 138) is reported in 369 Pa. 341, 85 A. 2d 845.

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, Chapter 646, 62 Stat. 929 (28 U. S. C. Section 1257).

QUESTION PRESENTED.

Whether the Supreme Court of Pennsylvania erred in entering judgment for respondent on the ground that under the federal rule petitioner's evidence was insufficient to prove that her injuries were caused by respondent's wilful or wanton negligence.

STATUTE INVOLVED.

The statute involved is the Hepburn Act, as amended, 34 Stat. 584, 49 U. S. C. Section 1(7).

STATEMENT.

The petitioner, Antoinette Turek, was injured on February 18, 1947, in the derailment of respondent's Train No. 68 in which she was a passenger on a free interstate pass containing a release of liability for negligent injury (R. 106a-110a). The derailment occurred at the Bennington Curve near Altoona, Pennsylvania, where the tracks lay on top of an embankment 90 feet high, sloping downward at an angle of one vertical foot to every two horizontal feet (R. 22a). No. 2 track eastbound, on which the train was traveling on the night of the accident, had a 35 miles-per-hour speed limit on the down-grade approach to the curve and a 30 mile limit on the curve itself (R. 12a).

Petitioner testified that she had traveled over the curve before, and as the train entered the down-grade approach to the curve on the night of the accident, instead of slowing down it picked up speed (R. 24a), her car began to sway, bumped along the track, turned over on its left side, and went down the embankment (R. 24a).

Respondent's Division Superintendent Morris, who was called as a witness by petitioner, read figures from a blueprint indicating that some of the cars remained on the track and some were dispersed several hundred feet down the embankment from the point of derailment (R. 14a-18a). Engineman Billig, who was operating the lead engine at the time of the accident, stated that he knew of the existence of the curve and the speed limit (R. 30a).

Petitioner offered no testimony as to the cause of the derailment and no other evidence to attempt to establish that her injuries were sustained as the result of respondent's wilful or wanton negligence.

For respondent Engineman Billig was recalled and testified that the train was 58 minutes late leaving Pittsburgh and lost five more minutes from there to AR, the last block tower west of the point of derailment (R. 37a). At AR he made a running road test of his brakes and found them

in good operating condition (R. 32a). Coming out of the tunnel on the down-grade approach to the curve the train was traveling 25 miles per hour (R. 33a). He set the train brakes in the usual manner (R. 33a) and as the train entered the curve it was traveling about 22 miles per hour (R. 34a). He felt a bump as though a spring hanger on one of the driving wheels had broken (R. 35a); then the injector pipe released a jet of steam which struck his face and chest and he remembered nothing after that (R. 35a).

J. H. Ryan was the block operator at AR who controlled the signals and train movements in that area on the morning of the accident. He testified from his record that No. 68 made its usual brake test as it passed his tower at 3:17 (R. 49a). It made the run to AR from MO, the tower two miles west of AR, in six minutes, although the regular running time was three minutes (R. 50a). Train No. 76, another passenger train which was following No. 68 on the same track, traveled the same distance in four minutes (R. 48a). Train No. 76 was switched off Track No. 2 to Track No. 1 because it appeared to be overtaking No. 68, and the operator therefore wanted to allow it to pass around No. 68 (R. 48a). Ryan determined that the wreck occurred at 3:22 A. M. because that was when the indicator lights on his track board went out (R. 47a).

P. W. Patterson, block operator at MO tower, testified from his record that No. 68 passed his tower at 3:11 on Track No. 2 (R. 79a). According to his record it had passed NY, eight miles west of MO, at 2:58, making that run in 13 minutes, although the normal schedule was 12 minutes (R. 79a, 81a). Train No. 76 made the run between NY and MO in 12 minutes (R. 81a). Patterson warned AR tower that Train No. 68 was not keeping its schedule, and for that reason Train No. 76, which was following it, was switched from Track No. 2 to Track No. 1 (R. 80a, 81a) to pass around it.

T. W. Ryan, block operator at MG tower, the next tower east of AR, testified from his record that Train No.

68 passed AR on Track No. 3 at 3:17, followed by Train No. 76 at 3:21 (R. 84a).

Superintendent J. D. Morris testified from the Pittsburgh train dispatcher's record that Train No. 68 passed SO tower, 8.6 miles west of NY, at 2:50 A. M. on the morning of the accident and that it covered the distance between those two towers at a rate of 45 miles per hour, although the speed limit was 70 miles per hour (R. 88a, 89a). Between NY tower and MO tower the train traveled at 39½ miles per hour, although the speed limit was 70 miles an hour (R. 89a). Since the train was 1314 feet long, when its rear end cleared AR tower, which is when its passing time was recorded, its head end was 1.87 miles from the point of derailment (R. 91a). Morris calculated the speed of the train for that distance on a five minute run at 22.4 miles per hour (R. 93a).

Morris was qualified as an expert witness on railroad wreck investigations and testified that considering the weight of the train, a speed of 30 miles per hour, the steepness of the down-grade and the degree of curvature, 1000 feet from the point of derailment would not have been an excessive distance for the equipment to have traveled after the derailment (R. 96a, 97a). Even at 22 miles per hour the equipment could have been expected to travel further down the embankment than the distances shown on the blueprint of the scene of the accident (R. 14a-18a, 97a). He was cross-examined on a paper purporting to be a table of train speeds on curves and read from that table the equilibrium, comfortable, safe and overturning speeds of a locomotive on an 8 degree curve with a three inch superelevation (R. 102a). He testified that in fixing speed limits a considerable margin of safety is allowed between the limit imposed and the speed at which there would be a dangerous loss of equilibrium (R. 99a, 100a).

The trial judge refused respondent's motion for a directed verdict, and the case was submitted to the jury on a charge setting forth the standard of proof of wilful

and wanton negligence which is applied both in the federal and in the Pennsylvania cases (R. 112a, 113a, 114a). The jury returned a verdict of $15,000 on which judgment was entered by the trial court in favor of petitioner.

The Supreme Court of Pennsylvania reversed that judgment and entered judgment in favor of respondent on the ground that under the federal rule, with which the Pennsylvania cases are in accord, the evidence was insufficient to sustain a verdict in favor of petitioner (R. 138-142).[1] In its opinion that Court described the federal rule with the phrase that is used in the Pennsylvania cases, "wilful or wanton misconduct" (R. 139). Subsequently petitioner filed a petition for reargument with the Supreme Court of Pennsylvania, asserting that the Court had applied an erroneous standard because of a nominal difference between the federal rule of "wanton negligence" and the Pennsylvania rule of "wanton misconduct" (R. 144-147). Since the two rules were in fact identical (R. 150, 151), the Supreme Court of Pennsylvania refused the petition for reargument.

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1. One justice dissented on the sole ground that in his opinion the evidence was sufficient to sustain the verdict under the principle which he, the trial judge and the majority of the Court accepted as controlling (R. 142-144).

ARGUMENT.

The petition demonstrates that this case does not meet the requirements of this Court for the granting of a writ of certiorari. The only question presented is the application to the evidence in this case of a recognized legal principle, accepted alike by the federal and Pennsylvania courts. The standard used by the Pennsylvania Supreme Court in determining the sufficiency of the evidence is the same standard that is applied in the federal cases. Petitioner's objections go solely to the name by which that standard was called by the Pennsylvania Supreme Court and not to its substance or its applicability.

Under the federal rule, which requires proof of wilful or wanton negligence or misconduct, petitioner's evidence was insufficient to sustain a judgment in her favor, and the decision of which review is sought was therefore correct.

I. The Decision Below Depends Entirely Upon an Evaluation of the Evidence.

The only question that was considered by the Supreme Court of Pennsylvania in deciding the case in favor of respondent was the sufficiency of the evidence to sustain a judgment in favor of petitioner, an interstate passenger on a free pass containing a release of the railroad company's liability for negligence. Both the trial court (R. 112a-114a, 129a, 130a) and the Supreme Court of Pennsylvania (R. 139, 140) recognized and applied the federal rule, most recently set forth by this Court in *Francis v. Southern Pacific Co.*, 333 U. S. 445 (1948), that in such a case recovery can be had only upon evidence of "wilful or wanton negligence".[2] The decision of the Supreme Court of Pennsyl-

2. The trial court, whose judgment petitioner seeks to reinstate, acknowledged that this rule "is often called 'wanton or wilful misconduct'" (R. 130a) and stated that the jury correctly found respondent "guilty of *wanton misconduct*" (Emphasis supplied) (R. 129a). And in *Kasanovich, Admrx., v. George*, 348 Pa. 199, 202, 34 A. 2d 523, 525 (1943), the Supreme Court of Pennsylvania, in an opinion by the dissenting justice in this case, pointed out that there is no difference in substance between "wanton negligence" and "wanton misconduct."

vania turned wholly on its evaluation of the evidence offered by petitioner measured by this standard.

This Court has often said, and did so in one of the cases relied on by petitioner, *New York Central Railroad Co. v. Mohney,* 252 U. S. 152, 157 (1920), that it does not weigh the evidence in cases of this kind. Cf. *Evens v. Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans,* 134 F. 2d 275 (5th Cir. 1943), *cert. den.* 319 U. S. 756 (1943). The Supreme Court of Pennsylvania found that there was no evidence in the record from which any reasonable inference in support of the jury's finding could be drawn, and in that situation this Court has regularly denied certiorari. *Healy v. Pennsylvania Railroad Co., cert. den.* 340 U. S. 935 (1951); *Roberts v. Alabama Great Southern Railroad Co., cert. den.* 340 U. S. 829 (1950); *Emmick v. Baltimore & Ohio Railroad Co., cert. den.* 340 U. S. 831 (1950); *Roberts v. Missouri-Kansas-Texas Railroad Co., cert. den.* 340 U. S. 832 (1950); *Gentry v. Seaboard Air Line Railroad Co., cert. den.* 340 U. S. 853 (1950). See also: *Layne & Bowler Corp. v. Western Well Works,* 261 U. S. 387, 393 (1923); *Wilkerson v. McCarthy,* 336 U. S. 53, 66-73 (concurring opinions) (1949).

II. The Pennsylvania Supreme Court Applied the Federal Rule in Determining the Sufficiency of the Evidence.

Petitioner's argument that the decision of the court below raises an issue of law is based upon a preoccupation with labels rather than upon any matter of substance. This is apparent from her contention that the error of the Supreme Court of Pennsylvania lay in its substitution of "'the term 'wilful or wanton misconduct' for the term 'wilful or wanton negligence'" (p. 3, Petition for Certiorari). Regardless of the names by which they are called, the principles applied in the federal and Pennsylvania cases are identical.[3] That those names are neither precise nor uni-

3. The loose terminology used by the courts in identifying these principles has often been recognized. See, for example, *Restatement of Torts,* Section 500, Special Note; *Prosser on Torts* (1941 ed.) pp. 260-262; and footnote 2, p. 6; Respondent's Brief.

formly used appears from a comparison of *Francis v. Southern Pacific Co.*, 333 U. S. 445 (1948), where the name of the liability-creating conduct is "wilful or wanton negligence", with *Bowman v. Pennsylvania Railroad Co.*, 299 Pa. 558, 566, 149 Atl. 877, 880 (1930), characterized by petitioner as recognizing "the true federal rule" (p. 10, Petition for Certiorari), where it is called "wilful, wanton, or gross negligence", and *Swain v. American Mutual Liability Ins. Co.*, 134 F. 2d 886, 887 (5th Cir. 1943), where the name is "wanton negligence or misconduct."

The Supreme Court of Pennsylvania, as did the trial court and the dissenting justice, used as its standard in evaluating the evidence in this case Section 500 of the *Restatement of Torts* which was quoted in its entirety, together with its own paraphrase of that principle set forth in *Kasanovich, Admrx. v. George*, 348 Pa. 199, 203, 34 A. 2d 523, 525 (1943) (R. 139, 140). The identical section of the *Restatement of Torts* is the substance of the federal rule stated in *Evens v. Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans*, 134 F. 2d 275 (5th Cir. 1943), *cert. den.* 319 U. S. 756 (1943), on which petitioner relies to demonstrate an imagined distinction between wanton misconduct and wanton negligence.

To set down the *Restatement* rule beside the *Kasanovich* rule is to demonstrate their exact equivalence:

Section 500, Restatement of Torts	*Kasanovich rule* 348 Pa. p. 203, 34 A. 2d p. 525
"The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to	"It must be understood, of course, that wanton misconduct is something different from negligence, however gross,—different not merely in degree but in kind, and evincing a different state of mind on the part of the tortfeasor. Negligence

Section 500, Restatement of Torts	*Kasanovich rule* 348 Pa. p. 203, 34 A. 2d p. 525
realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result."	consists of inattention or inadvertence, whereas wantonness exists where the danger to the plaintiff, though realized, is so recklessly disregarded that, even though there be no actual intent, there is at least a willingness to inflict injury, a conscious indifference to the perpetration of the wrong."

These principles were fairly applied to the facts of this case by the Pennsylvania Supreme Court (369 Pa. at p. 344, 85 A. 2d at p. 847):

> "We have examined this record in vain for any evidence upon which a jury properly could have predicated a finding that defendant's engineer, from the facts known to him, should have realized the imminent danger of derailment and injury to the train's passengers and, with a conscious disregard of the consequences of his act, he operated his train and permitted it to be derailed." (R. 140)

Cf. *Westre v. Chicago M. & St. P. Ry. Co.*, 2 F. 2d 227, 230 (8th Cir. 1924).

Petitioner's sophistical argument is illustrated by her discussion of *Evens v. Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans*, 134 F. 2d 275 (5th Cir. 1943), *cert. den.* 319 U. S. 756 (1943). On that case alone she pitches her claim of a "danger presented to the rights of a user of a free pass under the federal law by substitution of the term wanton misconduct for wanton negligence" (p. 12, Petition for Certiorari). A single sentence she plucks from its context in the dissenting opinion in the

Evens case and from it assumes to find a difference between the standard applied by the majority, which she describes as "wanton negligence", and the standard used by the dissenting judge, which she describes as "wanton misconduct" (p. 12, Petition for Certiorari). In fact, however, the dissenting judge there stated, "I am in complete agreement with my brothers' statement of the principle which controls this case" *id.* at p. 277, and in both majority and dissenting opinions Section 500 of the *Restatement of Torts* was followed. The only dispute in the *Evens* case between the majority and dissenting opinions, precisely as in the instant case, was in the application of this mutually accepted principle to the evidence.

That the Court of Appeals for the Fifth Circuit, on whose opinions in the *Evens* case petitioner relies to demonstrate her specious distinction between the labels "wanton misconduct" and "wanton negligence", recognizes no distinction between them is clear from its *unanimous* decision of a case considered within a month of the *Evens* case, *Swain v. American Mutual Liability Ins. Co.*, 134 F. 2d 886 (5th Cir. 1943). In the *Swain* case the same judges sat who decided *Evens*, and the court stated (at p. 887):

> "In the recent case of Evens v. Texas Pacific-Missouri Pacific Terminal R. R. of New Orleans, we had occasion to review the subject of *wanton negligence or misconduct* and there defined it to mean an act (or failure to act when there is a duty to act) in reckless disregard of the rights of another, coupled with a consciousness that injury is a probable consequence of the act or omission." (Emphasis supplied.)

It is therefore clear from the very authorities on which petitioner relies that the substance of the wanton misconduct rule is the precise equivalent of the wanton negligence rule, regardless of the name by which it is called.

In measuring the sufficiency of petitioner's evidence the Pennsylvania Supreme Court applied the federal rule,

whether it is called "wilful or wanton negligence" or "wilful or wanton misconduct."

III. The Pennsylvania Supreme Court Was Correct in Holding That the Petitioner Failed to Prove Wilful or Wanton Negligence.

In this case petitioner proved that a derailment occurred; that shortly before the derailment the car in which she was traveling swayed and bumped and jostled passengers about (R. 24a); that as the result of the derailment some of the cars were dispersed several hundred feet down a steep embankment on which the curve was laid (R. 14a-18a); and that the engineman knew that there was a speed limit on the curve and on its approach (R. 30a). She offered no direct or even opinion evidence of the train's rate of speed at the time of derailment. That was all of petitioner's evidence on liability.

That evidence, as the Supreme Court of Pennsylvania properly held, could not support a reasonable inference that there was excessive speed or any other act or omission amounting to wilful or wanton negligence. Under the federal rule petitioner had to show that, from facts known to the engineman *before the accident*, he should have realized the high degree of probability that a derailment would occur, and nevertheless so operated his train that it did occur. Petitioner's evidence failed to meet this standard, and the Supreme Court of Pennsylvania so held.

Even if it be assumed that the speed of the train had something to do with the accident, which, under the evidence would be pure speculation, the evidence here was far weaker than in *Delaware and H. R. Corp. v. Bonzik*, 105 F. 2d 341 (3d Cir. 1939), another derailment case. There the Court of Appeals for the Third Circuit held the evidence insufficient to establish wilful or wanton negligence, *despite positive proof that the train was traveling at more than double the speed limit at the time of the accident.*

In this case it was established merely that there was a speed restriction which was fixed primarily to assure passenger comfort, but there was no evidence offered to show that the prescribed limit was exceeded. Thus, while merely exceeding that limit, of which there was no proof, might have resulted in some passenger discomfort, it would certainly not have resulted in a "present or highly probable danger" of derailment. Nor would the engineman's knowledge of the *mere existence* of the speed limit, which was the *only* knowledge he had (R. 30a), justify an inference by the jury that exceeding it would carry with it a realization of imminent derailment. There was accordingly no evidence whatever that at the time of the accident the engineer knew or had reason to know of any present or highly probable danger to the passengers on his train.

The two cases on which petitioner relies to support her theory of recovery are readily distinguishable. In *New York Central Railroad Co. v. Mohney,* 252 U. S. 152 (1920), the engineer disregarded two block signals that were set against him, an obvious indication of highly probable danger ahead, and collided with the rear end of another train standing on the same track. In the instant case not only is there no competent proof that the train exceeded the speed limit, but the evidence shows that the speed limit was fixed with a "considerable margin of safety" before a point would be reached at which a dangerous loss of equilibrium would occur (R. 99a, 100a). As to *Pennsylvania Railroad Co. v. Goldie,* 182 F. 2d 9 (6th Cir. 1950), it is sufficient to note that that case was decided upon a record wholly different from the record in this case, and it was therefore properly rejected as a precedent by the Supreme Court of Pennsylvania.

There is no evidence, other than the mere fact of the derailment, that the accident was caused by the operation of the train at an excessive speed, and a fortiori there was none to support a finding that the operation of the train was such as to constitute wilful or wanton negligence. The

dispersal of the equipment after the derailment was, of course, subject to the elementary physical principle that the weight of a 1626 ton train (R. 86a) descending a 1.73 degree grade would of itself carry some of the cars down the steep embankment on which the curve was laid. Moreover, the only expert witness who testified on the subject, whose technical qualifications were admitted by the petitioner (R. 96a), testified that the dispersal of the equipment was far less than might reasonably have been expected in view of the size and weight of the train, the grade, and the curvature of the track (R. 97a). That witness testified that the dispersal was entirely consistent with a speed well below the speed limit on the approach to the curve and the curve itself (R. 97a). To that evidence must be added the affirmative and uncontradicted evidence that for the last 20 miles before the accident the train was not even maintaining its regularly scheduled speed, and that as it approached the point of the accident it was running within the prescribed speed limits.[4]

On this record the Supreme Court of Pennsylvania properly concluded that there was a total failure of proof of wilful and wanton negligence which was petitioner's acknowledged burden under the applicable federal rule.

CONCLUSION.

The respondent submits that the petition for certiorari should be denied.

Respectfully submitted,

PHILIP PRICE,
HUGH B. COX,
ROBERT M. LANDIS,
Attorneys for Respondent.

4. During the last twenty miles of its run, Train No. 68 was well behind the normal running time and losing ground to Train No. 76, another passenger train, to such an extent that No. 76 had to be switched to another track because of the danger of overtaking it (R. 48a, 80a, 81a, 88a-91a).